No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

APPELLEES' BRIEF IN REPLY TO BRIEF OF LEE ARENAS.

JOHN W. PRESTON,
712 Rowan Building, Los Angeles 13,

OLIVER O. CLARK,
710 Knickerbocker Building, Los Angeles 14,

DAVID D. SALLEE,
510 Garfield Building, Los Angeles 14,

Petitioners and Appellees.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

APPELLEES' BRIEF IN REPLY TO BRIEF OF LEE ARENAS.

Statement of Jurisdiction.

The District Court had jurisdiction of the parties and subject-matter under Title 25, U. S. C. A., Section 345. This Court has jurisdiction upon appeal under Title 28, U. S. C. A., Section 225(a).

Statement of the Case.

Lee Arenas has appealed from the judgment of the District Court awarding attorneys' fees and expenses of suit to his attorneys, John W. Preston, Oliver O. Clark and David D. Sallee, as follows: To John W. Preston, twelve and one-half per cent (12½%), and to Oliver O. Clark and David D. Sallee, ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas. [R. pp. 49-53, 54.]

Lee Arenas assigns two alleged errors of the District Court in rendering judgment, namely:

(1) That the finding that the contract for fees dated November 20, 1940, was superseded and rescinded is not supported by the evidence, hence judgment should have been for a total of ten per cent to all three attorneys; and

(2) That, even if said contract was not superseded or rescinded, the finding that John W. Preston is entitled to a fee of twelve and one-half per cent (12½%) is not supported by the evidence, and hence said fee is excessive.

A casual examination of the record shows that there is no merit in either assignment of error. The evidence quoted in appellant Arenas' brief (Br. pp. 4-13) is only part of the evidence in the case. Other evidence not referred to by said appellant amply supports both of the assailed findings.

ARGUMENT.

I.

The Evidence Supports the Finding That the Original Contract for Attorneys' Fees of Ten Per Cent (10%) Was Superseded, on or About September 7, 1943, by a Contract for Fees Upon a Quantum Meruit Basis.

The original contract between Lee Arenas and David D. Sallee provided for an attorney's fee of 10% of the allotted lands, or the value thereof. That proved to be insufficient. On or about September 7, 1943, after adverse judgment in the District Court, and affirmance thereof by this Court —it became necessary to file a petition for certiorari in the Supreme Court of the United States in order to secure a review of said adverse judgment. A *quantum meruit* contract was then entered into by Lee Arenas and Messrs. Preston, Clark and Sallee. [Petitioners' Exhibit No. 7, R. pp. 187-188.] The particular language of that contract here pertinent is:

> "I (meaning Lee Arenas) hereby agreeing to pay my said attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family." [R. p. 187.]

Lee Arenas testified in respect to the execution of the *quantum meruit* contract as follows [R. pp. 86-87]:

> "Q. Let's see that paper. Have you got it here? I show you this Petitioners' Exhibit No. 7 and call your attention to the word 'Lee' and to the word 'Arenas.' Didn't you make that mark on there? A. I don't know. Maybe I did.
>
> Q. What? A. Maybe I did.

Q. Maybe you did. Well, don't you know whether you did or not? A. I don't know.

Q. You don't know. Don't that look like your handwriting? A. I guess.

Q. How long would it take you to sign your name now? A. About—it would take quite a while.

Q. What would we have to do to get you ready to sign it? Would you have to have a chair and a table? A. Oh, right here I can sign it; yes.

Q. Right here you can sign it. Well, give us a piece of paper, Mr. Clerk. Do you want a pen? A. Oh, anything will be all right.

Q. Well, I guess this was written in pen. How would you like to write it with Preston's pen? It won't cost you a cent. A. All right.

Q. Now, write 'Lee Arenas.' A. Right here, huh?

Q. Right anywhere. Do you write with your left hand? A. I have to because this hand is no good.

Q. This hand is no good? A. No.

Q. Ordinarily you write with your other one, do you? A. Oh, when it is good; yes.

(Witness marking on paper.)

Mr. Preston: All right. We submit that and offer that in evidence as part of the cross-examination of this witness.

The Court: The examplar is received into evidence as Petitioners' Exhibit.

The Clerk: 18, your Honor."

Other testimony of Lee Arenas [R. pp. 88-89] shows that he was aware of the course of the litigation, something of the difficulties thereof, and of the work being done by petitioners, especially Judge Preston.

Marian Therese Arenas, wife of Lee Arenas, testified that he signed the *quantum meruit* contract, as follows [R. p. 91]:

> "Q. Now, I will show you a document which is in the same form, apparently a mimeographed copy of the previous one, except that it has the name of 'Lee Arenas' filled in and purports to be signed by him on the same date. This one is referred to as Petitioners' Exhibit No. 7. I will ask you whether you remember or whether you were present at the time that document was signed? A. Yes; I was.
>
> Mr. Preston: What is the answer?
>
> Mr. Taheny: She says I was, yes.
>
> Q. Do you recognize that as the signature of Lee Arenas? A. With his right hand; yes.
>
> Q. With his right hand? A. Yes."

It is true that Marian Therese Arenas says she thought the contract she signed [Exhibit No. 8] related to legal services in the ejectment suits brought by the Government. [R. pp. 94-95.] But, it is obvious that she is mistaken, as is shown by her subsequent testimony. [Cross-examination, R. pp. 95-99.] Moreover, her contract [Exhibit No. 8] shows on its face that the employment of petitioners by her was "in respect to all rights, including our *allotments*, which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same." [R. p. 189.]

We think there is little, if any, doubt from the testimony of Lee and Marian Arenas that they signed, and knew they were signing, a fee contract on a *quantum meruit* basis. But, if their testimony leaves the matter in doubt,

that doubt is completely set at rest by the testimony of Messrs. Clark and Sallee.

Mr. Sallee testified in respect to the signing of the *quantum meruit* contract as follows [R. pp. 138-139]:

"Q. Now, what conversation did you have with Lee, that you have just referred to, shortly before he and his present wife signed the documents which bear the date February 1, 1945, respecting the reasons for the execution of such documents? A. Most of that conversation was conducted by Mr. Clark and Mr. Arenas after I had opened the question.

Q. Mr. Clark was present? A. Yes.

Q. Where was the conversation? A. We had several, some in my office, and I think one or two in Palm Springs.

Q. And in every instance was the present Mrs. Arenas present? A. I can't swear to that—I can't say whether she was in on all of them at Palm Springs. Some times I would see Lee and she wouldn't be at home, but in my office she was there.

Q. I assume, Mr. Sallee, that Lee Arenas wouldn't know what quantum meruit meant? Or did you tell him? A. Yes I did. And so did Mr. Clark.

Q. What did you tell him? A. The reasonable value for services—that the Court would set the fees accordingly.

Q. I don't like to lead an attorney, but— A. I am a poor witness, I know.

Q. As a part of that conversation, did you tell him that it was the considered opinion of you gentlemen, in view of what had been done and was needed to be done, that ten per cent would not be a reasonable fee? A. Correct.

Q. Did you tell him what would be a reasonable percentage? A. I did not.

Q. Did Mr. Clark? A. Not in specific figures, no.

Q. Did Mr. Arenas or his wife ask? A. No."

Mr. Clark testified in respect to the *quantum meruit* contract as follows [R. pp. 148-150]:

"Q. Will you briefly state the gist of these conversations leading up to the new agreement? A. When it became necessary to petition the United States Supreme Court, I went to Palm Springs and talked with Lee. I told him that it would be necessary for me and Dave to go to Washington and be admitted to the Supreme Court before we could file a petition for certiorari, but that I felt, in view of the importance of the litigation and its then condition, that it would be very much to his advantage to employ another lawyer who had had experience in practice in the United States Supreme Court, and that I had spoken to Judge Preston, who had formerly served in the State Supreme Court on the bench and who had also served the Government in several important capacities, and that I had come to recommend to him that Judge Preston be employed in association with Dave and myself for the purpose of the petition to the United States Supreme Court and the conduct of the case thereafter if we won in that court. I told him that this would, of course, mean the payment of additional compensation to the lawyers, and that I had not discussed with Judge Preston what his fee would be, but if the plan met with Lee's approval I would do that and talk with him further. Lee told me that he would be very glad for that to be done and for me to go ahead. I then returned to Los

Angeles and presented the matter in detail to Judge Preston, and as I recall, a period of at least two weeks elapsed, because Judge Preston was rather reluctant to engage in the litigation, but I continued to press the matter. He made a trip to the North and upon his return called me and said that he would be willing to be associated in the case. I then contacted Lee Arenas. It is my impression that Dave had called him to Dave's office and that Dave was present on this occasion. At the time I made this report I told Lee that Judge Preston had agreed to the association and that it would be necessary to prepare an additional contract covering our compensation, but that we were so busy in doing the things that had to be done in the case because we were working under a time limit, that I would not undertake to prepare that contract until other things had been attended to, but that when I did prepare the contract it would be upon the basis of a reasonable fee for the work done, having in mind what should be accomplished in event we won it, and the fee to be fixed by the United States District Court here, and I explained that to him in detail as to how it was fair, I thought, to us and fair to him, so that the Court knew exactly what the picture was and the Court then could say what was a reasonable fee to us and what was reasonable for Lee to pay. He told me it was perfectly fair and to go ahead and let him know when I wanted the new contract signed. The matter went on for a long time before I got around to the drafting of the contract with Dave, and then it eventuated into the signing of the later and last contract. When that contract was signed I read it to Lee and explained it to him, reminded him of the conversation that we had had before in reference to

it, and Lee in substance said it was acceptable to him, and it was signed.

Q. When you contacted Judge Preston did you relate to Judge Preston, in substance, the representations and statements that you had made to Mr. Arenas, such as you have just stated? A. I did relate to Judge Preston what I had said to Lee, and I had contacted Judge Preston before I suggested him to Lee.

Q. Before Judge Preston accepted employment you related to him, in substance, the statements you have just related? A. I did.

Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940? A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case? A. Yes."

It thus appears that Lee Arenas signed the *quantum meruit* contract; that before signing it, the meaning of *"quantum meruit"* was explained to him by Mr. Clark in Mr. Sallee's presence; and that Lee Arenas understood what he was signing, and was willing for the court to fix a reasonable fee, or fees, for his attorneys based upon work done and results accomplished.

The finding attacked as insufficient [Finding No. II, R. pp. 41-42] is fully supported by the evidence of Lee Arenas, Marian Therese Arenas, Oliver O. Clark and David D. Sallee.

II.

The Finding That Petitioner John W. Preston Is Entitled to an Attorney's Fee of 12½% of the Value of the Property Allotted to Lee Arenas Is Supported by the Evidence; and the Amount Awarded Is Not Excessive.

The record shows the large amount of work done by petitioner John W. Preston, and by Messrs. Clark and Sallee, the skill required to do said work, and the value thereof. [See especially, Petitioners' Exhibit No. 4A, entitled "Statement of Facts," R. pp. 163-173, where the course of the litigation, work done, *et cetera,* are set forth in detail.]

Appellant's brief completely ignores this statement. It also fails to state adequately the testimony concerning the value of the services rendered to Arenas by the petitioner. Indeed, it fails to even mention the testimony of Mr. L. F. Martineau, Jr., and only sketchily refers to the testimony of Mr. T. B. Cosgrove, both of whom are able and respected members of the California Bar.

Mr. L. F. Martineau, Jr., testified in respect to the value of petitioners' services in behalf of Lee Arenas in this litigation [R. pp. 68, 69, 70] as follows:

> "Q. I see; well, Mr. Martineau, taking into consideration the nature of the questions of law involved in this case, as disclosed by your examination of the record on file herein, and taking into consideration the work performed by petitioners, as disclosed by this examination, and assuming the statement of facts in Petitioners' Exhibit 4-A are true, and further assuming that the oral testimony presented in your hearing today is true, have you an opinion as to the reasonable value of the services performed herein

collectively by the petitioners, John W. Preston, Oliver O. Clark and David D. Sallee? Answer that yes or no. A. I have.

Q. Will you please give us the benefit of your opinion? A. In my opinion—

. . . . . .

The Witness: If the court please, may I have the question read?

The Court: The question calls for an expression of your opinion.

Mr. Preston: Yes. You answered the question 'yes,' and then my last question was: Give us the benefit of your opinion, if that is the question you are interested in. A. If I assume the valuations which have appeared in evidence at this hearing—

The Court: You just state a figure, if you will, please, assuming the property is worth a million dollars or thereabouts. A. Assuming the property to be worth a million dollars or from one million up to $1,047,000, as the two witnesses have testified, and if I am now to state a figure in dollars, I believe that a fee of $275—

Mr. Preston: 275 what? A. $275,000 as an award to the petitioners in this matter now on hearing would be a reasonable and a moderately reasonable fee.

And if, on the contrary, I assume from the discussions which I have heard and the remarks of your Honor, that there is a question yet to be determined, not before me, of valuation, and a substantially lower valuation might be determined by the court and therefore a percentage basis should be used as a means by which the court might determine a reasonable compensation, then in my judgment that percentage

should approximate twenty-seven and one-half per cent, and in no event should be lower than 25 per cent, might be as high as thirty-three and one-third per cent, and would not be unreasonable if it were 50 per cent."

The witness gave specific reasons for his valuation of petitioners' legal services as follows [see R. pp. 70-74]:

"I put the question, if I may explain, in the alternative in the light of the studies which I have made of this case and this record, and in the light of the testimony which has been given here, in order to facilitate your Honor in a determination which I know from experience in any case of this sort is difficult.

The Court: Have you assumed that the compensation of the attorneys, the petitioners here, is entirely dependent upon the outcome of this case?

The Witness: I have. But I should like to add to that answer, if the court please, that I, in this matter, as usual, referred to Canon No. 12, I believe it is, of the Code of Ethics of the American Bar Association, which, as I recall it, specifies six factors which normally should be considered by counsel in attempting to arrive at a reasonable fee and, to supplement that, refreshment of my memory by looking over certain notes and memoranda I had respecting fees which involved, in all probability, 10 or a dozen other factors.

Limiting my answer for the moment to matters mentioned in the Canon of the American Bar Association, the fact that compensation is taken on a contingency is one of the important factors to be considered. But I should add here that all factors under the holdings of the courts need not be given by a

witness as having equal weight under the circumstances in any particular case.

The Court: I take it you have taken into consideration the nature of the matter, the amount involved, the complexity of the problem?

The Witness: I have.

The Court: The responsibility imposed, the time spent, and the results achieved?

The Witness: I have taken all of those factors into consideration.

The Court: As well as the fact that all compensation—you have assumed all compensation to be contingent?

The Witness: I have.

The Court: Now, if you assume that compensation is not contingent what would be your opinion, both in dollars and in percentage?

The Witness: If I assumed that the compensation were not contingent and that the clients were financially able to pay what members of the profession would call a reasonable fee, I would not make a reasonable fee at the conclusion of the litigation and efforts made by counsel in this case on the 27th of last August at very much less than $250,000, if the court please, even if there were a fixed ability to pay.

The Court: That is, considering all the factors you have mentioned, except—

The Witness: The contingency.

The Court: —except the contingency. What would you say would be a reasonable percentage of the recovery, assuming that the fee was not contingent?

The Witness: As I stated a moment ago, I think that the recovery might well have been one-third to

a half. But I might explain that answer, if your Honor desires, by saying that from my study of the records in this case I would assume that Lee Arenas was, to use Judge Preston's phrase, put upon the country; that he would not have any greater or lesser rights than any other fully qualified citizen of the United States or than I myself might have if I had to go to the Bar with a problem such as his, making no distinction either in his favor or against him because of his being a member of the Mission Band of Indians, in which event I would have found that my fellow members of the Bar would have said to me: That you may expect this case, taken on a contingency, to be 25, 33⅓, or 50 per cent, depending upon the stage at which it may be concluded, which is well familiar to all of us.

The Court: If not taken upon the contingency, what percentage do you think the petitioners should be entitled to as reasonable fees for their services?

The Witness: I would think that if the case were not taken on a contingency, that a reasonable fee ought to provide for a base fee. By that I mean a fee not less than a certain sum plus the reasonable value of services.

If I did not answer your question, your Honor, I perhaps did not understand it.

The Court: Suppose they were not contingent, but upon the completion of the litigation, why, the client said: 'Well, gentlemen, you have recovered this property for me. That is all I have. I am willing to give you a share of what you have recovered'?

The Witness: Well, if that were true, your Honor—

The Court: What would be that percentage, then?

The Witness: I would not base the fee upon a percentage. I would have to take into consideration the other five factors of the American Bar Association over and above the contingency, and I might want to take into consideration some of the other factors established by the court.

The Court: Perhaps you did not understand my question. I am assuming that you are taking into consideration all other factors which you have mentioned.

The Witness: Then I would answer you—

The Court: But we will assume that the compensation is not contingent upon recovery.

The Witness: All right. If I now understand your statement correctly, I would say that it would be upon a percentage plus some other figure. I tried to answer that by saying it would be plus some basic compensation, with a percentage of the recovery of property or a percentage based upon the amount and success of the litigation, depending upon the success of the litigation, and that percentage, I think, would have to be analyzed in the particular case.

Now, in this particular case, if the court please, I have not made any such computation."

Mr. T. B. Cosgrove testified as follows [R. pp. 74-76]:

"Q. That is the case. Well, Mr. Cosgrove, if you were to assume the facts set forth in the Petitioners' Exhibit 4-A to be true and correct, and add to that your research of the exhibits mentioned here in 10, 10-A and -B, 11-A, 11-B, 12-A, -B, -C, 13-A, -B, -C and -D, and you applied to them the rules of law that are set forth in the authority that you refer to to the facts as detailed by these documents that you have examined, and couple that with your own

experience and judgment as a trial lawyer in this State, have you an opinion as to what would be or should be the reasonable value of the services performed by petitioners in this case known in the record as Arenas vs. The United States of America? A. Yes; I do.

Q. Have you any particular form in which you prefer to express your opinion, that is to say, in dollar value or in percentage of property recovered? A. I cannot express it in dollar value. I can express it only in percentage.

Q. Will you please give us the benefit of your opinion? A. 27½ per cent.

Q. 27½ per cent. You have given that idea much thought, have you not, Mr. Cosgrove? A. I have worked on it, I would say, several days.

Q. Several days. And that is the conclusion you reach. You said you could not put a dollar value on it. Why is that true? A. Because the value, as I understand it, is entirely uncertain, and in this statement which I have here it says the value of the lands recovered is considerably in excess of $1,000,000. That might mean 10,000,000.

Q. I see. If it was in excess of a million you would make it 27½ per cent? A. Well, I thought the value was a decidedly uncertain factor and I would not want to undertake any statement about what the value of the services were, expressed in dollars and cents.

Q. Then, if this court finds that value of the property to be much or little, your percentage would stand as a single item or a calculation, would it? A. That is correct. The figure I arrived at is not contingent upon whether it is worth more than a million or less than a million."

Mr. Cosgrove further testified as follows [R. pp. 77-78]:

> "The Court: Let us assume the value of the land is $100,000.
>
> The Witness: It would still be 27½ per cent.
>
> The Court: If it was $50,000 would it still be the same?
>
> The Witness: Still be the same; yes.
>
> The Court: And if it were a million dollars?
>
> The Witness: It would still be the same."

The evidence of Mr. Martineau and Mr. Cosgrove is not contradicted. The valuations placed by them upon petitioners' services to Lee Arenas are more than the Court allowed by its judgment.

It is quite clear that the aggregate fee of 22½% allowed to all three of the petitioners—that is, 10% to Messrs. Clark and Sallee, and 12½% to Judge Preston—is fully sustained, and is not contradicted by the evidence. The findings of the Court [Findings Nos. VII and VIII, R. pp. 42-43 and 44] are likewise fully supported by the evidence.

In *United States v. Anglin & Stevenson,* 145 F. 2d 622, the Court of Appeals for the Tenth Circuit made an allowance for fees of 25% of the value of the estate of Jackson Barnett, an incompetent Creek Indian. There, as here, the reasonableness of the fee allowed was challenged. In disposing of the contention of the United States, the Court said at page 630:

> "The United States also challenges the reasonableness of the attorneys' fees allowed, contending that by the Government's participation in the suit, it greatly facilitated and expedited the determination

of the rightful heirs, and assisted counsel for appellees and the court in reaching a just result, thereby minimizing and reducing the time, efforts, and expense of the appellees. It is true, as contended, that a representative of the United States was present and participated in every step of the proceedings—not only the Attorney General's office assisted in the taking of depositions, securing witnesses, and identifying heirs, but a representative of the Federal Bureau of Investigation was present during all or most of the proceedings for the purpose of combatting perjury and fraudulent claims. It is also true that the Secretary approved the so-called family settlement which enabled the three family groups to present a united front, and in other ways the Government threw its weight on the side of the rightful heirs. But at no time in the trial did it assume a role of an advocate in their favor, instead it maintained a position of strict neutrality throughout the proceedings. The position taken by the Government, and its contribution to the trial, did not avoid the necessity of employing counsel on a contingent basis and the expenditure of $33,561.63, which the Government does not deny was prudently spent in the prosecution of the suit. It is unnecessary to further detail the course of the litigation, suffice it to say that it was long and tedious, and consumed the time, talents and money of the appellees over a period of approximately five years. The outcome of the litigation was necessarily uncertain and the appellees assumed all of the hazards of it.

"The allowance of 25% of the amount recovered is well within the proof adduced on this record in support of a reasonable attorney's fee, and it is well settled that in cases of this kind the allowance of attorney's fees is within the judicial discretion of the

trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong. City of Wewoka v. Banker, 10 Cir., 117 F. 2d 839. That rule would seem to have cogent application in view of the rich and mature background of the learned trial judge. As a distinguished lawyer of the Indian Territory and of Indian law; first Chief Justice of the Supreme Court of the State of Oklahoma; Governor of the State; twenty years a judge of the United States District Court which comprises the Indian Territory; a judge of the United States Circuit Court of Appeals for the Circuit in which Indian litigation is plentiful, and as one whose conservatism and frugality are so well known, we do not know of anyone better qualified by knowledge and experience to fix and determine the amount of attorneys' fees, particularly in cases of this kind. Certainly, it does not lie within the competency of this court to disturb his judgment on this record.

"The judgment is affirmed."

Conclusion.

The findings of the District Court in respect to the value of petitioners' services in behalf of Lee Arenas in this litigation are amply supported by the evidence adduced, and the judgment should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
By JOHN W. PRESTON,
Petitioners and Appellees.